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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ALLEN BAKER,

Defendant and Appellant.

2d Crim. No. B293809
(Super. Ct. No. 18F-02395)
(San Luis Obispo County)

Joseph Allen Baker purports to appeal a judgment entered following his nolo contendere plea to assault upon a custodial officer, with admissions that he inflicted great bodily injury and suffered a prior serious felony and strike conviction. (Pen. Code, §§ 241.1, 12022.7, subd. (a), 667, subd. (a), 667, subds. (d) & (e), 1170.12, subds. (b) & (c).)¹

This appeal concerns Baker's plea and admissions entered on August 29, 2018, and the challenge to his negotiated sentence

¹ All statutory references are to the Penal Code unless otherwise stated.

due to the trial court's newly granted discretion to strike the five-year serious felony enhancement of section 667, subdivision (a). We conclude that Baker's claim is barred because he did not obtain a certificate of probable cause. Accordingly, we dismiss the appeal.

FACTUAL AND PROCEDURAL HISTORY

On August 1, 2018, the San Luis Obispo County prosecutor charged Baker by information with three counts relating to his assault and battery upon a peace or custodial officer. The information also alleged that Baker personally inflicted great bodily injury and that he suffered a prior serious felony and strike conviction and served two prior prison terms. On August 29, 2018, Baker entered a nolo contendere plea to an assault count and admitted the prior serious felony and strike conviction. Pursuant to a negotiated plea agreement, the trial court sentenced Baker to a 12-year prison term, consisting of a two-year term for the assault count, doubled for the strike allegation, three years for the great bodily injury enhancement, and five years for the serious felony enhancement. The court imposed a \$3,600 restitution fine, a \$3,600 parole revocation restitution fine (suspended), a \$40 court operations assessment, and a \$30 court facilities assessment. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.) It awarded Baker 214 days of presentence custody credit. The court also dismissed the remaining counts and prior prison term allegations.

Baker purports to appeal and contends that he is entitled to a remand for resentencing pursuant to Senate Bill No. 1393, which allows the trial court the discretion to strike or dismiss prior serious felony convictions imposed pursuant to section 667, subdivision (a). The Attorney General contends that we must

dismiss Baker's appeal because Baker did not obtain a certificate of probable cause pursuant to section 1237.5, subdivision (b).

DISCUSSION

Retroactivity

At the time of Baker's sentencing, section 1385, subdivision (b) prohibited the trial court from striking any prior conviction of a section 667, subdivision (a) serious felony enhancement. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560-1561 [imposition of section 667, subdivision (a) enhancement is mandatory].) On September 30, 2018, Senate Bill No. 1393 was signed, and Baker filed his notice of appeal one month later. Effective January 1, 2019, Senate Bill No. 1393 amended section 1385, subdivision (b) to grant the court discretion to impose or to strike section 667, subdivision (a) enhancements. (See Legis. Counsel's Dig. to Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, p. 6672 ["This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of [a] 5-year enhancement"].)

Baker filed a notice of appeal on October 31, 2018, one month following the Governor's signature on Senate Bill No. 1393. He did not request a certificate of probable cause.

As the parties agree, the amended section applies retroactively to Baker because his judgment is not yet final. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 600 [absent a savings clause, amendatory statute lessening punishment presumed to apply to all cases not yet reduced to final judgment as of effective date of statute]; *People v. Brown* (2012) 54 Cal.4th 314, 324 [presumption that law mitigating punishment applies to all nonfinal judgments]; *People v. Garcia* (2018) 28 Cal.App.5th 961,

973 [Senate Bill No. 1393 applies to all cases not yet final when it became effective on January 1, 2019].)

Certificate of Probable Cause (§ 1237.5, subd. (b))

Baker argues that we should dispense with the certificate of probable cause requirement because Senate Bill No. 1393 was not in effect at the time he entered his plea. He concedes that appellate courts are divided regarding the necessity for a certificate of probable cause before seeking a remand for resentencing pursuant to the new law. (Cf. *People v. Galindo* (2019) 35 Cal.App.5th 658, 673 [dismissing appeal for defendant's failure to obtain certificate of probable cause], review granted August 28, 2019, S256568; and *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1016-1017 [dismissing appeal for defendant's failure to obtain certificate of probable cause], review granted June 12, 2019, S255145; with *People v. Stamps* (2019) 34 Cal.App.5th 117, 121-124 [remanding for resentencing], review granted June 12, 2019, S255843; and *People v. Alexander* (2019) 36 Cal.App.5th 827 [remanding for resentencing], petn. for review pending, petn. filed July 31, 2019, S257190.)

We agree with the appellate decisions holding where, as here, the parties have agreed to a specific sentence as part of a negotiated plea, a defendant must obtain a certificate of probable cause to pursue an appeal challenging his or her sentence pursuant to Senate Bill No. 1393. These decisions reason that the appeal is, in substance, an attack on the validity of the plea. (*People v. Johnson* (2009) 47 Cal.4th 668, 678 [certificate of probable cause required if challenge directed to an integral aspect of sentence to which defendant agreed]; *People v. Buttram* (2003) 30 Cal.4th 773, 781-782; *id.* at p. 789 ["[W]hen the parties agree to a *specified* sentence, any challenge to that sentence attacks a

term, and thus the validity, of the plea itself”]; *People v. Panizzon* (1996) 13 Cal.4th 68, 73, 76 [certificate of probable cause required to challenge validity of plea].) The five-year enhancement was a bargained-for component of Baker’s sentence; he entered a negotiated disposition for a 12-year sentence to avoid a longer sentence that could have been imposed considering the counts and allegations later dismissed by the trial court. Under these circumstances, he is not entitled to pursue the possibility of a reduction of his sentence.

We dismiss the appeal because Baker did not obtain a certificate of probable cause.

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GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

Richard B. Lennonm, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Steven D. Matthews, Roberta L. Davis, Deputy
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